FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 14 1950
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 606

LONDON GUARANTEE & ACCIDENT CO., LTD. AND WEEDEN T. UNDERWOOD,

Petitioners,

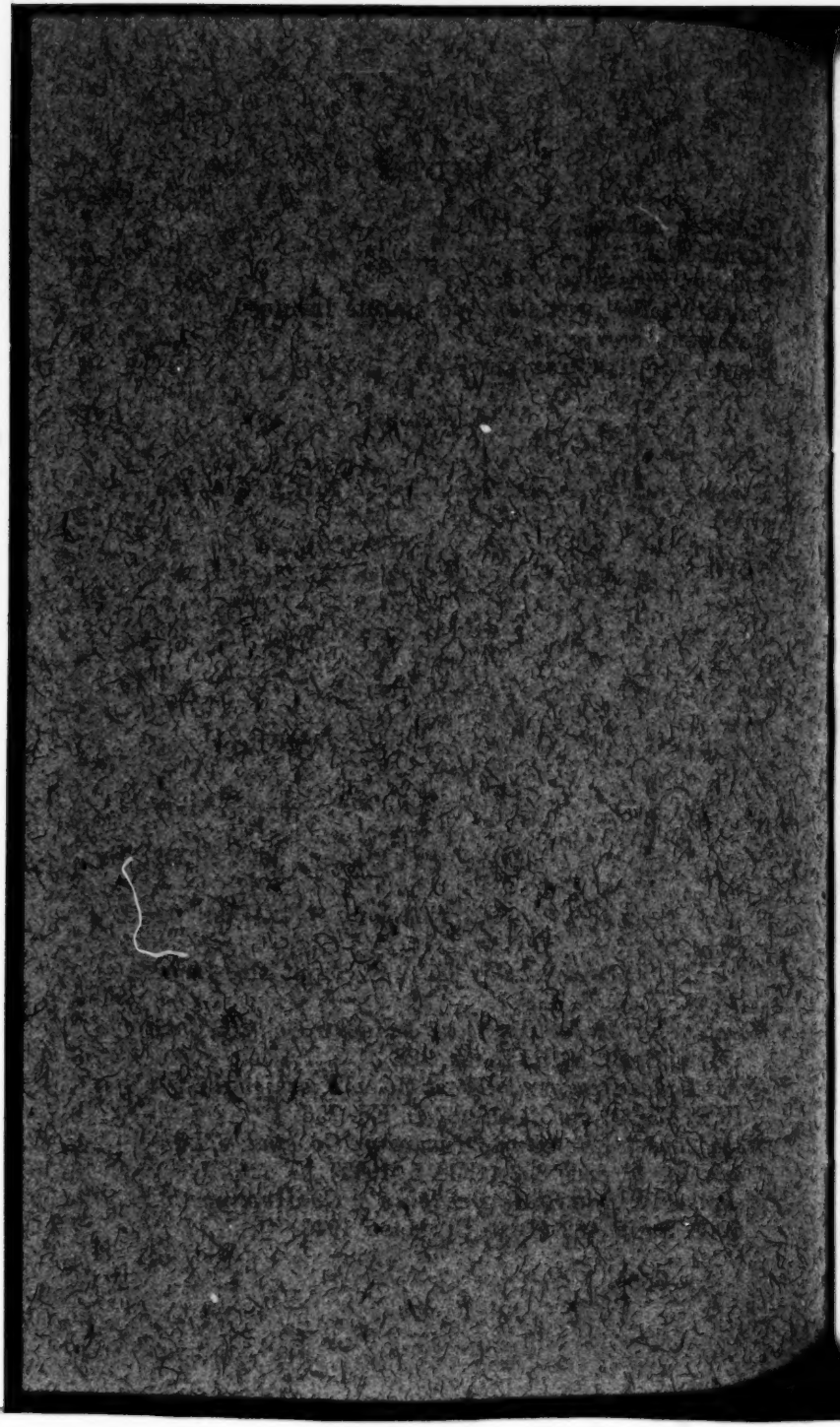
vs.

HORACE W. BEHELER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS.

GEORGE A. CHALKLEY, JR.,
Counsel for Petitioners.



INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Constitutional provision and statute involved	2
Statement	2
Reason for Granting the Writ	4

CITATIONS

Cases:

Arcand v. *Gutterson & Gould, Inc.*, (N.H.) 16 A(2d) 697	7
Asselin v. *Blount*, 65 R. I. 293, 16 A(2d) 328	7
Baizley Iron Works v. *Span*, 281 U. S. 222, 50 S. Ct. 306, 74 L. Ed. 819	8
Danielson v. *Morse Dry Dock & Repair Co.*, 235 N.Y. 439, 139 N. E. 567	8
Davis v. *Dept. of Labor & Industries*, 317 U. S. 249, 63 S. Ct. 225, 87 L. Ed. 246	5
De Bardeleben Coal Corporation v. *Henderson*, 142 F (2d) 481, (CCA 5, 1944)	7
DeGraw v. *Todd Shipyard Co.*, 133 N.J.L. 402, 47 A(2d) 338 (1945)	10
Divins v. *Hazeltine Electronics Corp.*, 163 F(2d) 100, (CCA 2, 1947)	5
Ellis v. *Gulf Oil Corp.*, 48 F. Supp. 771 (Dist. Ct. N.J., 1943)	7
Garcia v. *Warner Quinlan Co.*, 9 F. Supp. 1010 (Dist. Ct. S. D. N. Y. 1934)	8
Gonsalves v. *Morse Dry Dock & Repair Co.*, 266 U. S. 171, 45 S. Ct. 39, 69 L. Ed. 228	8
Great Lakes Dredge and Dock Co. v. *Kierejewski*, 261 U. S. 479, 43 S. Ct. 418, 67 L. Ed. 756	8
Massachusetts Bonding & Insurance Co. et al. v. *Lawson*, 149 F. (2d) 853 (CCA 5, 1945)	8
Melanson v. *Bay State Dredging & Contracting Co.*, 62 F. Supp. 482 (Dist. Ct. Mass. 1943)	7

Page

Messel v. *Foundation Co.*, 274 U. S. 427, 47 S. Ct. 695, 71 L. Ed. 1135 8
Newport News Shipbuilding and Dry Dock Co. v. *N.L.R.B.*, 101 F(2d) 841 (CCA 4, 1939) 8
Parker v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 62 S. Ct. 221, 86 L. Ed. 184 7
Paul v. *Virginia*, 8 Wall. (75 U. S.) 168, 19 L. Ed. 357 10
Reichert Towing Line, Inc. v. *Long Island Machine and Marine Construction Co.*, 287 Fed. 269 (Dist. Ct. E. D. N. Y., 1922) 8
Ritch v. *Puget Sound Bridge & Dredging Co.*, 156 F(2d) 334 (CCA 9, 1946) 5
Robins Dry Dock & Repair Co. v. *Dahl*, 266 U. S. 449, 45 S. Ct. 157, 69 L. Ed. 372 8
Southern Pacific Company v. *Jensen*, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086 4
Sultan R & T Co. v. Dept. of Labor & Industries, 277, U. S. 135, 48 S. Ct. 505, 72 L. Ed. 820 7
T. J. Moss Tie Co. v. *Tanner*, 44 F (2d) 928 (CCA 5, 1930), Cert. den. 283 U. S. 829, 51 S. Ct. 353, 75 L. Ed. 1442 7
Tucker v. *Branham*, 151 F (2d) 96 (CCA 3, 1945) 7
Tucker v. *Norton*, 56 F. Supp. 61 7
U. S. v. *Southeastern Underwriters Assn.*, 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 10
Wheeler Shipyard Inc. v. *Lowe*, 13 F. Supp. 863 (Dist. Ct. E. D. N.Y. 1935); affirmed 82 F(2d) 1022 8
Wood Towing Corp. v. *Parker*, 76 F (2d) 770 (CCA 4, 1935) 8

Constitution and Statutes:

Constitution, Article I, Sec. 8 ..... 2, 5
Constitution, Article III, Sec. 2 2
Longshoremen's & Harbor Workers' Compensation Act (Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C. 901 et seq.) 2, 4
Rhode Island Workmen's Compensation Act (Pub. Laws, 1912, Ch. 831, as amended; Gen. Laws of R. I. (1923) Ch. 92 § 1205 et seq.) 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 606

LONDON GUARANTEE & ACCIDENT CO., LTD. AND WEEDEN T. UNDERWOOD,

Petitioners,

vs.

HORACE W. BEHRLE,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Rhode Island and Providence Plantations sustaining the order of the Superior Court of the State of Rhode Island which in turn sustained the order of the Director of Labor awarding compensation benefits to the respondent.

Opinions Below

The opinion of the Supreme Court of the State of Rhode Island (R. 62) is reported in 68 A (2d) 63. The opinion of the Superior Court of the State of Rhode Island (R. 51) is not reported.

Jurisdiction

The opinion of the Supreme Court of the State of Rhode Island was entered August 17, 1949 (R. 69), and a petition for rehearing was denied November 16, 1949 (R. 69). The jurisdiction of this Court is invoked under 28 U. S. C. 1257.

Question Presented

Whether the State of Rhode Island has jurisdiction for workmen's compensation purposes over an employee engaged in the repair of a naval vessel in the navigable waters of the United States; whether a naval vessel is an instrumentality of interstate or foreign commerce.

Constitutional Provision and Statute Involved

Constitution, Article I, § 8:

> "The Congress shall have power . . .
> "To regulate commerce with foreign nations and among the several states . . .
> "To provide and maintain a navy."

Constitution, Article III, § 2:

> "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdictions."

The Longshoremen's & Harbor Workers' Compensation Act (Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C. 901 *et seq.*)

Rhode Island Workmen's Compensation Act (Pub. Laws, 1912, Ch. 831, as amended; Gen. Laws of R. I. (1923) Ch. 92, § 1205 *et seq.*)

Statement

On December 17, 1943 and for some time prior thereto, respondent had been employed by petitioner, Weeden T. Underwood, a plumbing contractor in the City of Newport,

Rhode Island. During the war then in progress, Underwood had been engaged as a sub-contractor to perform plumbing work incident to the repair of vessels at Newport Shipyard. (R. 63). In connection with this enterprise, Underwood maintained an office at the shipyard and a foreman and four or five plumbers were regularly assigned to the repairing of vessels. When the work load at the shipyard required additional plumbers, they were sent from Underwood's main office, and respondent had previously been sent to the shipyards on several occasions (R. 25). On December 17th respondent was sent to the shipyard and was assigned to repair leaking pipes in the engine room of the Y. M. S. 80, a mine sweeper of the United States Navy (R. 12). This vessel was tied alongside another ship which in turn was moored to the dock. Both vessels were in navigable waters of the United States (R. 50). When respondent completed his work on the Y. M. S. 80, he mounted the rail of the vessel to jump to the rail or deck of the adjoining vessel on his way to the dock. A wave caused the vessels to change position and as a result, respondent fell to the deck of the first boat, causing his serious injury and disability.

Petitioner Underwood had procured a policy of workmen's compensation insurance according to the terms of which petitioner, London Guarantee and Accident Co., Ltd. agreed to pay workmen's compensation benefits chargeable to petitioner Underwood. Respondent filed claim for workmen's compensation benefits under the Rhode Island Workmen's Compensation Act. The claim was controverted on the ground that the injury was compensible under the Longshoremen's & Harbor Workers' Compensation Act and not under the State Workmen's Compensation Act (R. 3) (and on other grounds no longer at issue). Respondent was granted workmen's compensation benefits under the State Act. By way of appeal, petitioners filed a complaint

in the Superior Court of the State of Rhode Island. The Superior Court sustained the award of the Department of Labor. Petitioners thereupon appealed to the Supreme Court of the State of Rhode Island, which Court affirmed the decision of the Superior Court (R. 62).

Reason for Granting the Writ

The Federal Government can scarcely point with pride to the protection it has afforded citizens injured while working under circumstances to place them within the exclusive jurisdiction of Federal authority. As is frequently the case where a field of law is in the developmental stage, injustices have occurred. These injustices have resulted in corrective legislative action. Thus the case of *Southern Pacific Company* v. *Jensen,* 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, ultimately fathered the Longshoremen's & Harbor Workers' Compensation Act (Act of Mar. 4, 1927, 44 Stat. 1424, 33 U. S. C. 901 *et seq.*). When lack of a workmen's compensation act for the District of Columbia became a glaring imperfection, the coverage of the act was extended to that jurisdiction (Act of May 17, 1928, 45 Stat. 600, 36 D. C. Code (1940) 501). The act was subsequently made applicable to employees at United States installations abroad (42 U. S. C. A. 1651, 1701, 1702). When the remedies afforded by the act fell far behind the progressive legislation enacted by many states, the benefits afforded by the act were substantially liberalized (Act of June 24, 1948, 62 Stat. 602, 33 U. S. C. 906 *et seq.*). Thus, so far as legislative action could do so, the Federal law has kept abreast of the humanistic trend of public opinion to afford adequate compensation for industrial casualties.

Concurrent with this development, however, there has grown up a small but potent group of court decisions limiting and narrowing the scope and applicability of the Federal

statutes. The effect of these cases has been to create confusion as to jurisdiction, to hedge and qualify what should be clear and definite, and to deny to numerous claimants the broad, adequate protection which the Constitution permitted, and which Congress intended to extend to them.

There could scarcely be a clearer delegation of authority than is contained in the applicable clauses of Article 1, Sec. 8, of the Constitution. Congress has the unquestioned power to provide for an army and navy, to regulate interstate commerce and to legislate concerning the maritime jurisdiction of the United States. Congress has exercised that power by means of the Longshoremen's and Harbor Workers' Compensation Act.

That act makes no mention of concurrent state jurisdiction except to exclude cases properly cognizable under state law. By its terms it affords complete coverage to workmen injured while within Federal jurisdiction. Yet cases (cited *infra*) have now been decided, both in federal and state courts, nibbling away the jurisdiction of the Longshoremen's Act. To date they have produced doubt and confusion. Unless the trend is halted, the mischief thus launched will be limited only by the incidence of industrial accidents.

The instant case serves to illustrate the trend. A state court, using a decision of this court (*Davis* v. *Dept. of Labor & Industries*, 317 U. S. 249, 63 S. Ct. 225, 87 L. Ed. 246) as an opening wedge, and contradictory opinions of Circuit Courts of Appeal (*Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. (2d) 334 (C. C. A. 9, 1946)); *Divins* v. *Hazeltine Electronics Corp.*, 163 F. (2d) 100 (C. C. A. 2, 1947) to widen the breach, has asserted its jurisdiction over an injury occurring on a Federally owned vessel while on the navigable waters of the United States. If the Longshoremen's Act does not apply to such facts, then it may be doubted that there are any facts to which it is applicable.

If such a decision is permitted to stand, the Longshoremen's & Harbor Workers' Compensation Act becomes a dead letter. There will be no need to repeal it. Its repeal, as a practical matter, will be accomplished by state judicial interpretations.

Moreover, a matter of substance and of vital importance to a large group of workers is here involved. The difference between the Federal and state acts in the benefits available to the claimant may amount to thousands of dollars in this case alone. The difference would amount to even more under the Longshoremen's Act as amended in 1948.[1] This case is only typical of thousands of accidents occurring annually under similar circumstances.

Up to the date of the recent cases cited above, jurisdictional decisions affecting workmen's compensation followed an orderly pattern continually narrowing the field in which jurisdiction was questionable and thus eliminating confusion with each succeeding decision. It had been determined that purely local activities were subject to local regulation, that crews of vessels were covered by the Jones Act (Act of Mar. 4, 1915, 38 Stat. 1185, amended June 5, 1929, 41 Stat. 1007; 46 U. S. C. 688 *et seq.*) and harbor workers

---

[1] The relative welfare of the claimant in this case depends upon whether his injury principally results in loss of earnings or medical expense. A comparison of the benefits under the state and Federal Acts is as follows:

	Total disability	*Partial disability*	*Medical benefits*
Rhode Island Act	60% of loss of earnings, not exceeding $20 per week for 1,000 weeks	60% of loss of earnings, not exceeding $18 per week for 800 weeks	$500, except by court permission
Federal Act	66⅔% of loss of earnings, not exceeding $25 per week up to $7,500	66⅔% of loss of earnings, not exceeding $25 per week up to $7,500	Unlimited.
Federal Act as amended, 1948	66⅔% of loss of earnings, not exceeding $37.50 per week, unlimited as to total payments.	66⅔% of loss of earnings, not exceeding $37.50 per week, unlimited as to total payments.	Unlimited.

were subject to the Longshoremen's Act. Thus, such work as oyster culture and logging were subject to the state law in spite of their locale on or near navigable water. *Asselin* v. *Blount*, 65 R. I. 293, 16 A(2d) 328; *Sultan R. & T. Co.* v. *Dept. of Labor & Industries*, 277 U. S. 135, 48 S. Ct. 505, 72 L. Ed. 820.

Crews of vessels were covered by the Jones Act even though their duties incidentally took them ashore. *Melanson* v. *Bay State Dredging & Contracting Co.*, 62 F. Supp. 482 (Dist. Ct. Mass. 1943); *Tucker* v. *Branham*, 151 F. (2d) 96 (C. C. A. 3, 1945), affirming *Tucker* v. *Norton*, 56 F. Supp. 61. Miscellaneous harbor workers, not classed as crew members, but employed on or about vessels on navigable waters, were subject to the Longshoremen's Act. *T. J. Moss Tie Co.* v. *Tanner*, 44 F. (2d) 928 (C. C. A. 5, 1930), Cert. den. 283 U. S. 829, 51 S. Ct. 353, 75 L. Ed. 1442; *De Bardeleben Coal Corporation* v. *Henderson*, 142 F. (2d) 481, (C. C. A. 5, 1944); *Ellis* v. *Gulf Oil Corp.*, 48 F. Supp. 771 (Dist. Ct. N. J., 1943).

It has been held, further, that Federal and state jurisdiction was not concurrent. Federal jurisdiction embraced the entire field defined in the *Jensen* decision. *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 62 S. Ct. 221, 86 L. Ed. 184; *De Bardeleben Coal Corporation* v. *Henderson, supra.* Moreover, the indicia of jurisdiction were recognized and respected by the state courts. For example, a state court declined jurisdiction in the case of an employee injured while signalling to a crane operator who was loading a vessel. *Arcand* v. *Gutterson & Gould, Inc.* (N. H.) 16 A(2d) 697.

It is also worth noting that certain occupations or pursuits became generally acknowledged as falling within one or the other jurisdiction. As has been already pointed out, oystering is local in character; *Asselin* v. *Blount, supra.* So is bridge building or repairing, the only connection with water commerce being the desire to avoid it. On this ground

the recent *Davis* case (*Davis* v. *Dept. of Labor & Industries, supra*) is capable of easy reconciliation with earlier and apparently divergent cases.

In this connection two well recognized principles are directly applicable to the instant case. It has been uniformly held that repair of a vessel to fit it for service on navigable waters causes the workmen to be subject to Federal jurisdiction. *Baizley Iron Works* v. *Span*, 281 U. S. 222, 50 S. Ct. 306, 74 L. Ed. 819; *Great Lakes Dredge and Dock Co.* v. *Kierejewski*, 261 U. S. 479, 43 S. Ct. 418, 67 L. Ed. 756; *Gonsalves* v. *Morse Dry Dock & Repair Co.*, 266 U. S. 171, 45 S. Ct. 39, 69 L. Ed. 228; *Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U. S. 449, 45 S. Ct. 157, 69 L. Ed. 372; *Messel* v. *Foundation Co.*, 274 U. S. 427, 47 S. Ct. 695, 71 L. Ed. 1135; *Wood Towing Corp.* v. *Parker*, 76 F. (2d) 770 (C. C. A. 4, 1935); *Wheeler Shipyard, Inc.* v. *Lowe*, 13 F. Supp. 863 (Dist. Ct. E. D. N. Y. 1935), affirmed 82 F. (2d) 1022; *Garcia* v. *Warner, Quinlan Co.*, 9 F. Supp. 1010 (Dist. Ct. S. D. N. Y. 1934); *Reichert Towing Line, Inc.* v. *Long Island Machine and Marine Construction Co.*, 287 Fed. 269 (Dist. Ct. E. D. N. Y., 1922); *Danielson* v. *Morse Dry Dock & Repair Co.*, 235 N. Y. 439, 139 N. E. 567.

A case involving another Federal statute, but of particular interest because it concerns repair of a naval vessel, is *Newport News Shipbuilding and Dry Dock Co.* v. *N. L. R. B.*, 101 F. (2d) 841 (C. C. A. 4, 1939). A very recent case similar on the facts to the instant one is *Massachusetts Bonding & Insurance Co. et al.* v. *Lawson*, 149 F. (2d) 853 (C. C. A. 5, 1945).

It is also well settled that an employee's activity at the time of his injury is the sole factor determining jurisdiction. The fact that his *usual* duties would not subject him to Federal jurisdiction is immaterial. *Parker* v. *Motor Boat Sales, supra; Great Lakes Dredge and Dock Co.* v. *Kierejewski, supra; Ellis* v. *Gulf Oil Corp., supra.*

The decision of the Rhode Island Court in the case at bar is bottomed squarely on the proposition that United States naval vessels are not engaged in interstate commerce. "Were it not for the fact that in the case at bar the petitioner had been working on a ship of the United States Navy, we probably would be constrained to apply the rule of the *Jensen* case, and overrule the decision of the trial justice, as the accident clearly happened in connection with repair work on a ship in navigable waters. However, there is no evidence in the record before us that the Y. M. S. 80 was ever used as a ship of commerce or that it was being repaired at the time of the accident for such purpose" (R. 65). The opinion then devotes over two pages to a discussion of cases on naval vessels as instruments of interstate commerce. By way of summation, the decision alludes to the existing conflict between Federal courts of appeal concerning the interstate commerce character of naval vessels and the absence of a guiding decision by this Court. The Court then expresses its own doubts on the subject, and concludes by applying the state statute.[2]

It is respectfully urged that the doubts expressed by the Supreme Court of Rhode Island ought now to be resolved.

Whether or not a naval vessel, or any other transportation instrument of the Department of National Defense is engaged in interstate or foreign commerce, is an interesting and important question. Fortunately, the recent war was fought on foreign shores. During that war, virtually the entire effort of this nation was directed toward the production of instruments of interstate and foreign commerce and the cargoes, both human and material, of that commerce.

---

[2] The opinion below thus arrives at the incongruous conclusion that a naval ship of war, existing by virtue of the exclusive power of Congress to create and maintain navies, is less subject to Federal legislation than a vessel operated by a private citizen of a state. The opinion is silent as to any logical or authoritative support for this novel result.

The instant case is but one of many which must turn on the question of the interstate character of National Defense activities in wartime. Its importance in that respect is overshadowed only by its continuing implications affecting broad peacetime activities of the Federal government. The issue affects the validity and scope of effectiveness of numerous Federal statutes. Thus, the Longshoremen's Act, the Fair Labor Standards Act, the Walsh-Healey Act, the National Labor Relations Act, the activities of the Federal Trade Commission, the Securities and Exchange Commission, and innumerable others are, to an important extent, influenced, governed or controlled by the instant issue. It is an issue which this Court ought not to let go unresolved.

Failure to resolve the issue will inevitably compound existing confusion. Circuit courts of appeal have already arrived at directly contradictory decisions: *Ritch* v. *Puget Sound Bridge & Dredging Co., supra; Divins* v. *Hazeltine Electronics Corp., supra.* The highest court of New Jersey has adopted an interpretation tending to limit and diminish *Federal jurisdiction: DeGraw* v. *Todd Shipyard Co.,* 133 N. J. L. 402, 47 A(2d) 338 (1945). Now Rhode Island has joined the trend. Shall we wait until these decisions are buttressed by others, until the trend becomes a pattern upon which society and business base their behavior and predicate their conduct?

A decision establishing a fundamental jurisdictional issue becomes the basis for decisions so far-reaching that a change disrupts business over the entire continent. This Court early decided that the insurance business was intrastate in character and was not subject to Federal control. *Paul* v. *Virginia,* 8 Wall. (75 U. S.) 168, 19 L. Ed. 357. When the decision was finally modified (*U. S.* v. *Southeastern Underwriters Assn.,* 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440), billions in wealth, the savings and security of millions of citizens were unsettled. It was deemed neces-

sary to reestablish the pre-existing status by Congressional action (Act of Mar. 9, 1945, 59 Stat. 33, 15 U. S. C. 1011 *et seq.*).

Are we then to wait for determination of the existing similar issue until the mischief is already done, until the cure is worse than the ailment? We entertain no doubt but that the decision of the court below is erroneous. We believe the other cited cases, both state and federal, to the same effect are equally erroneous. The question is—when will those decisions be corrected? It is respectfully urged that the time for correction is now, before a mass of legal precedent accumulates and in time to forestall the welter of uncertainty and confusion which will be the inevitable product of decisions to date.

Respectfully submitted,

GEORGE A. CHADWICK, JR.,
Counsel for Petitioners.